FORM MOTION TO PRECLUDE, JULY 2014

(modify as needed based upon posture of your case and any subsequent developments in law)

Defendant moves this Court to preclude the "cold" or "blind" testimony of Wendy Dutton, pursuant to Rules 702 and 401-403, Ariz. R. Evid., and the Due Process Clauses of the United States and Arizona Constitutions. As discussed in the following Memorandum of Points and Authorities, Dutton's proffered testimony does not aid the jury: It is not based upon sufficient facts or data, the Child Sexual Abuse Accommodation Syndrome is unreliable, and her testimony does not fit the facts of this case.

MEMORANDUM OF POINTS AND AUTHORITIES

Wendy Dutton testifies throughout Arizona, including in this Court, with great regularity and her testimony from case to case is virtually identical. She is proffered as a "cold" or "blind" expert, which means she purposefully does not know any of the facts of the case so that she avoids implying to the jury that she has an opinion as to a particular witness's veracity. Some exemplar transcripts of previous testimony are included in the Appendix to this motion, showing that over a two-decade period of time, her testimony has barely changed at all.

LEGAL ARGUMENTS

Wendy Dutton has been allowed to testify about the Child Sexual Abuse Accommodation Syndrome (CSAAS) since *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (App. 1996). This initially occurred because CSAAS was never subjected even to the *Frye* general acceptance test. *See State v. Lindsey*, 149 Ariz. 72, 720 P.2d 73 (1986); *State v. Moran*, 151 Ariz. 378, 728 P.2d

248 (1986). When the Supreme Court modified Rule 702 and explicitly abandoned the *Frye* standard in favor of *Daubert*, trial courts are now required to exercise their gatekeeping function and reassess Dutton's qualifications and her area of testimony for reliability.

Where CSAAS evidence was previously considered admissible without even having to conduct a *Frye* hearing, *Daubert* requires the court to conduct a rigorous analysis of the methodologies supporting the evidence. In *Lear v. Fields*, the trial court properly recognized that under *Daubert*, Dutton would be precluded for multiple reasons. 226 Ariz. 226, ¶ 5, 245 P.3d 911, 914 (App. 2011). *Lear* was resolved based on unconstitutionality of A.R.S. § 13-2203 (predecessor to new Rule 702), but it is clear that Judge Fields correctly surmised in 2010 that Dutton provides nothing of value to juries. For CSAAS to be admissible, it is required "that the expert 'employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Ariz. St. Hosp. v. Klein*, 231 Ariz. 467, ¶ 29, 296 P.3d 1003, 1009 (App. 2013) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). The recent opinion of the Arizona Supreme Court in *State v. Salazar-Mercado*, specifically restricted its holding regarding Dutton and CSAAS to the record in that particular case. 234 Ariz. 590, ¶ 19, 325 P.3d 996, ¶ 19 (2014). Additionally, the opinion requires an evidentiary hearing to be held on this issue. *Id.* at ¶ 20. Upon conducting an evidentiary hearing in this case, it will become clear that Dutton does not meet the rigorous standards of Rule 702.

I. CSAAS evidence may be challenged under new Rule 702, Ariz. R. Evid., and the Court of Appeals' opinion in *Salazar-Mercado* does not control because no evidentiary hearing was conducted in that case.

Lindsey and *Moran* allowed such testimony without any kind of evaluation of the data supporting CSAAS or the reliability of the methodology because, in 1986, Arizona followed the

Frye standard and the Arizona Supreme Court did not require a *Frye* hearing for this kind of testimony. Now that new Rule 702 is in effect, however, Dutton's testimony must, for the first time, be challenged through an evidentiary hearing.

In *Salazar-Mercado*, the Supreme Court noted that the defendant did not request an evidentiary hearing. 234 Ariz. 590, ¶ 17, 325 P.3d 996, ¶ 17. Although it is the duty of the proponent of expert evidence to demonstrate, by a preponderance of the evidence standard, that the testimony satisfies the *Daubert* standard, neither party asked for the trial court to conduct such a hearing and both the State and defendant stipulated to the trial judge's previous experience with the witness. *Id.* at ¶ 18. On review, the Court emphasized this lack of a trial court record when reviewing the ruling under an abuse of discretion standard. *Id.* at ¶ 19.

What is considered within the general public's sphere of understanding has certainly changed over the course of a generation since the Court decided *State v. Lindsey*, 149 Ariz. 72, 720 P.2d 73 (1986). For example, the general public has been exposed for the last decade and more to a considerable amount of information about sexual abuse by Catholic priests, and some of those abuses did not get reported for as long as fifty years after the abuse occurred. Expert witnesses are no longer needed to explain why a child would delay disclosure of abuse against parents or other adults in positions of power over the child. Furthermore, scholarship has shown that delayed disclosure is commonly understood by the general public. Kamala London et al., "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?," 11 *Psychol. Pub. Pol'y & L.* 194, 220 (March 2005).

An evidentiary hearing will allow the defendant here to develop the record that the Supreme Court did not have in *Salazar-Mercado*.

II. CSAAS evidence is inadmissible under Rule 702(a)-(c) because it includes information within the jurors' knowledge, it lacks sufficient facts or data, and it is

unreliable.

When *Lindsey* was decided in 1986, considerably less was known about child sexual abuse, and it was believed that an expert who could explain children's behavior could greatly assist the jury. As stated above, however, with regard to child sexual abuse allegations, the world is a very different place now than it was in 1986 and much more is known not only by researchers but by the general public. With the proliferation of internet access, information on any topic is available instantly. A quick search of the term "delayed disclosure of molestation" in any search engine will garner thousands of results. This is a topic that is being discussed online, and a topic about which numerous articles and websites are readily available. When the issue is whether scientific or technical expert evidence should be admissible, courts should not blindly turn to precedent, rather courts must reconsider the viability of that evidence – particularly when both the culture and the rules governing admissibility have undergone such a dramatic change.

CSAAS testimony has been provided in courts across America at least since 1983, when clinical psychiatrist Roland Summit coined the term and came up with the phases of the syndrome in order to help other therapists treat their patients. Cara Gitlin, Note, "Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit Its Admission," 26 *Quinnipiac L. Rev*. 497, 499-502 (2008). With no studies or data to back the theory up, psychologists and social workers lined up at the courthouse steps to offer testimony that the syndrome was a proven diagnostic tool and the experts could divine the truth of the accusations, including in Arizona. *See Moran*, 151 Ariz. at 382-83, 728 P.2d at 252-53.

While courts universally refused to allow experts to testify directly about the credibility of the accusation, *id*., they often did little to inquire about the reliability of the testimony, in

Arizona as elsewhere. Dr. Summit himself noted in 1992 that "It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument." London, at 197. Under new Rule 702, however, this Court may take a fresh look at CSAAS. For the reasons stated below, even Dutton's generalized testimony is inadmissible.

First, Rule 702(a) requires the expert to provide information that is outside the realm of the jury's knowledge. Dutton's testimony is introduced by prosecutors primarily for the concept of delayed disclosure and to state that there is no one way in which abused children behave. This is well-understood by lay people. For example, the extent of the child sexual abuse scandal infecting the Roman Catholic Church for the past 10-15 years is common knowledge, including its impact on the dioceses of Phoenix and Tucson. In most of those cases, the victims delayed their disclosure until many years later.

Second, Rule 702(b) requires that the testimony be "based upon sufficient facts or data." "Where an expert's opinion is based on insufficient information, the analysis is unreliable." *Paz v. Brush Engineered Materials, Inc*., 555 F.3d 383, 388 (5th Cir. 2009). Without an evidentiary hearing or anything more specific than a reference to "the literature," it is impossible to know upon what Dutton was basing her testimony. But as shown above, it is known what facts she does ***not*** have – the facts of this case. CSAAS in general is based on the assumption that the child was in fact abused – something that has not yet been determined but is supposed to be the whole point of the criminal trial. Studies that have purported to support CSAAS have failed to define how certain cases are selected for inclusion in the studies. London, at 209-10. For these reasons, CSAAS testimony is not based upon sufficient facts or data.

Third, the testimony must be the "the product of reliable principles and methods." Ariz. R. Evid. 702(c). As shown by London, at 220, the CSAAS paradigm is flawed to its core. While

Dutton does not use the CSAAS terminology, her testimony is still tailored to the CSAAS model. Furthermore, Dutton's CSAAS testimony is not offered only in those cases where the abuser and abused have a close relationship, such as father-daughter, but even in cases like this where the defendant is a cousin who does not live in the household; thus, bringing her testimony into a case like this misapplies CSAAS. *See* Gitlin, at 537-38. Of course Dutton herself cannot possibly know this since she is "blind," but this should not save her. A psychologist or psychiatrist could not offer such testimony without knowing how it is being used (or misused) because one could not opine whether such testimony crossed the limits of proper use.[1] And, ultimately, the State also bears the responsibility for ensuring that its witness's testimony will be relevant and reliable.

Many jurisdictions that have reviewed the admissibility of CSAAS evidence have concluded that the science underlying CSAAS is not reliable enough to assist a jury. For example, in *United States v. Velarde*, 214 F.3d 1204 (10th Cir. 2000), the Court examined the trial court's failure to conduct a reliability determination before admitting testimony of two doctors. The doctors testified about specific behavior exhibited by the victim that is consistent with sexual abuse. *Id.* at 1209, 1211. The Court held that, especially in light of the defendant's request for a *Daubert* hearing, it was not harmless error to allow the testimony. *Id.* at 1211.

[1] Psychiatrists who offered such testimony would be ethically obligated to inform the jury that there is a countervailing view and that CSAAS has been challenged in literature. American Medical Ass'n Report of the Council on Ethical and Judicial Affairs #12-A-04, p.3, http://www.ama-assn.org/resources/doc/code-medical-ethics/907a.pdf (last visited March 4, 2014). Psychologists similarly are ethically required to "describe fairly the bases for their testimony and conclusions [and] whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions." American Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct, eff. Dec. 1, 1992, Standard 7.04 http://www.apa.org/ethics/code/code-1992.aspx (last visited March 4, 2014). Dutton should not be permitted to hide behind the lack of a doctorate in psychology since her testimony is clearly in the area of psychology.

Using a *Daubert* evaluation in a case that was tried just before *Daubert* was decided, the Supreme Court of Louisiana, in *State v. Foret*, 628 So.2d 1116, 1124 (La. 1993), noted that the proper use of CSAAS was to assist those treating children of abuse and to provide a common language within the community. The use as a basis for determining if abuse occurred has been criticized by experts and courts. *Id.* Specific criticisms to that type of use of CSAAS include a margin of error that the Court could not accept as reliable. *Id*. at 1126. Also, the child abuse profile contains a "long list of vague and sometimes conflicting psychological characteristics." *Id*. There is also the possibility that behavior "attributed to abuse is sometimes the result of other emotional problems that do not stem from abuse." *Id*. at 1127. The Court concluded that the CSAAS type of evidence, when used for anything other than the original purpose, "is of highly questionable scientific validity, and fails to survive the *Daubert* threshold test on scientific reliability." *Id*. Thus, there is reason to question if CSAAS should be "relied upon in any fashion." *Id.*

In *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992), the Supreme Court of Kentucky reversed a conviction in which an expert testified to the symptoms shown by the children, but did not testify that the symptoms would lead to a diagnosis of CSAAS. The Court stated, "avoiding the term 'syndrome' does not transform inadmissible hearsay into reliable scientific evidence. Neither the syndrome nor the symptoms that comprise the syndrome have recognized reliability in diagnosing child sexual abuse as a scientific entity." *Id.*

That Court later adopted a general rule that CSAAS testimony is inadmissible under *Frye* and under general relevance principles, and expressed doubt about whether it would pass muster under *Daubert*. *Newkirk v. Commonwealth*, 937 S.W.2d 690, 695 (Ky. 1996). *Newkirk* found numerous problems with CSAAS in cases involving recantation, including the lack of

"diagnostic reliability of a positive CSAAS finding because children who had not been sexually abused might well exhibit similar traits." *Id.* at 691. The trial court in that case allowed a cold expert to provide limited testimony about recantation and the jury was instructed that the testimony was not offered to prove whether or not the abuse occurred. *Id*. (citing *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986)). There was no general acceptance in the scientific community that justified the use of the testimony as evidence to prove sexual abuse or to identify the abuser. *Id*. at 693. There was also a question as to relevancy since the testimony did not "make the existence of any fact of consequence more probable or less probable than it would have been without the evidence." *Id.* Such testimony also invades the province of the jury, as the "more courts permit experts to advise the jury based on probability, classifications, syndromes and traits, the more we remove the jury from its historic function of assessing credibility." *Id*. at 696.

Habeas corpus relief was granted in a case where another cold expert testified using CSAAS. The reviewing court found that because defense counsel was ineffective for failing to ask questions about the scientific basis for the testimony or the research literature that supported the testimony. *Gersten v. Senkowski*, 426 F.3d 588 (2d Cir. 2005). The court noted that "even a minimal amount of investigation into the purported 'Child Sexual Abuse Accommodation Syndrome' would have revealed that it lacked any scientific validity for the purpose for which the prosecution utilized it: as a generalized explanation of children's reactions to sexual abuse, including delayed disclosure and blurred memory." *Id*. at 611.

In *State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993), the Supreme Court of Tennessee upheld a long string of cases from lower courts that held CSAAS evidence inadmissible. The court examined only the probative/prejudicial value of the evidence and did not analyze the

evidence under *Daubert*. The expert in the case had examined the children and testified that the children exhibited traits of CSAAS. The court held the evidence inadmissible, stating: "The symptoms of the syndrome are not like a fingerprint in that it can clearly identify the perpetrator of a crime. Expert testimony of this type invades the province of the jury to decide on the creditability of witnesses." *Id.* The court also concluded that "no one symptom or group of symptoms are readily agreed upon in the medical field that would provide a reliable indication of the presence of sexual abuse," and "because no consensus exists on the reliability of a psychological profile to determine abuse, expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to substantially assist a jury in an inquiry of whether the crime of child sexual abuse has taken place." *Id.* at 562.

In *Commonwealth v. Dunkle*, 602 A.2d 830, 834 (Pa. 1992), the Supreme Court of Pennsylvania used a similar probative/prejudicial analysis to reverse a defendant's conviction due to the admission of cold expert testimony on CSAAS. In doing so, the court concluded:

> [E]xpert testimony about the behavior patterns exhibited by sexually abused children does not meet this threshold determination. While it may bear upon a matter in issue, it does not render the desired inference more probable than not. It simply does not render any inference at all. Rather, it merely attempts, in contravention of the rules of evidence, to suggest that the victim was, in fact, exhibiting symptoms of sexual abuse. This is unacceptable.

Id. Later cases limited this decision: "the teaching of *Dunkle* is that expert testimony will not be permitted when it attempts in any way to reach the issue of credibility, and thereby usurp the function of the factfinder." *Commonwealth v. Delbridge*, 855 A.2d 27, 42 (Pa. 2003) (admitting the evidence to respond to defense allegations that victim's memory was tainted).

In *State v. Michaels*, 625 A.2d 489, 502 (N.J. App. 1993), the expert testified that all but one of the abused children exhibited symptoms of CSAAS and "thereby validated the children's reports of sexual abuse to the jury by demonstrating an alleged scientific process of determining

whether the children were actually sexually abused." The court reversed the convictions even though the expert never named CSAAS in her testimony, but rather gave a list of symptoms that the children displayed. *Id.* The court concluded that admission of the testimony gave the expert the means "to lead the jury to believe that the process was rooted in science and thus was a reliable means of determining sexual abuse." *Id.*

It is well-known that Dutton's "cold expert" testimony in every case, whatever it is based on, generally puts forth the idea that *any* child, regardless of whether such child is a molest victim, will have behavior consistent with being a molest victim. She frequently opines that a child could be asymptomatic or have a plethora of behavioral symptoms. Her all-encompassing, sweeping statements about "shared characteristic behavior" should be reason enough to find that her "specialized" knowledge would not assist the trier of fact, her testimony is not based on sufficient facts or data, and it is not the product of reliable principles or methods. "There is a serious problem with the accommodation syndrome in that in some instances it seeks to show why the behavior of an alleged abused child is the same as, not different from, the behavior of a child who has never been abused. . . . ***The fact a child acted normally is not evidence of abuse***." *State v. Stribley*, 532 N.W.2d 170, 174 (Iowa App. 1995) (emphasis added). As the Texas Court of Criminal Appeals stated, "soft science does not mean soft standards." *Coble v. State*, 330 S.W.3d 253, 280 & n.48 (Tex. Crim. App. 2010).

III. Dutton must be excluded under Rule 702(d) because her testimony cannot be made to "fit" the facts of the case without commenting on issues of witness credibility.

In *Salazar-Mercado*, the Court of Appeals had held that cold experts should be allowed to testify so long as the relevance of their testimony will be borne out through other evidence and the jury can apply the testimony to the facts of the case. *State v. Salazar-Mercado*, 232 Ariz. 256, 304 P.3d 543 (App. 2013). "Rather, for this 'generalized' testimony to be admissible the

rule 'simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.'" 232 Ariz. 256, ¶ 11 (quoting Fed. R. Evid. 702, advisory comm. notes). Yet the Court did not analyze whether Dutton's testimony actually "fit" the facts of the case. *See id.* at ¶ 14. It would be erroneous to state that Dutton's testimony "fits" the facts of the case simply because this case involves child sexual abuse allegations made against a family member.

"Cold experts" such as Dutton have their testimony on a short leash because they come so dangerously close to commenting on the veracity of the accusations. For this reason Dutton is not even allowed to know the facts of the case. It is impossible to make Dutton's testimony "fit" the facts of the case without asking questions that at least tread around the vicinity of the facts of the case; otherwise, she is answering questions about subject matters that have nothing to do with the case. Yet at the same time, in a case involving child sex charges where the only issue is the credibility of the accusations, allowing Dutton to tailor her testimony to the facts of the case will inevitably result in commenting on the credibility of the accusers and thus how the jury should decide the case, something this Court has explicitly forbidden. "[E]xperts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration." *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76.

Although the State may assert that the jury must be educated about such concepts as "delayed disclosure", the effect of relating Dutton's testimony to specific facts of a case is solely to bolster the accuser's credibility. For this reason, even under the "fit" test, Dutton's testimony

can never be made to "fit" the evidence of the case without violating *Lindsey* and *Moran*.

III. A proper standard is needed for guiding trial courts in exercising the gatekeeping function with psychological testimony.

Fields that are properly called "sciences" should be subjected to rigorous testing and validation procedures before they are accepted as science in the courtroom. In fact, the *Daubert* standard liberalized admission of new discoveries because it did not require a trial court to find that sufficient time had elapsed for the discovery at issue to gain "general acceptance in the relevant field" required under *Frye*. The *Daubert* factors for consideration of scientific evidence may not be all-inclusive, but they have been listed by the Supreme Court for good reason: because they all serve the underlying purpose of determining the reliability of the science and methodology at issue in the expert's testimony.

Some fields of so-called expert evidence, such as the police-developed forensic sciences, have come under fire in recent years for failing to satisfy any kind of reliability test and have resulted in provably false convictions. The report of the National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" (2009), showed that many forensic sciences that had been universally accepted as grounded in sound scientific principles were actually lacking such scientific basis. Arizona murder convictions were subjected to post-conviction collateral challenges for newly-discovered evidence once DNA testing became a sure way to verify the identity of the perpetrator. *See, e.g., State v. Tankersley*, 211 Ariz. 323, 121 P.3d 829 (2005) (forensic odontology questioned after another defendant convicted on such evidence exonerated by DNA). It is good public policy to require science to follow the scientific method.

CSAAS testimony, including the flavor that Dutton provides in her "cold" testimony,

purports to be grounded in science; and as such, it must be subjected to the rigors of science. "Submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593. If a theory has only attracted minimal support in the scientific community, it is properly viewed with skepticism. *Id.* In the case of Dutton's testimony regarding characteristics of abused children, as stated above, even the originator of CSAAS has admitted that it is not a scientific instrument.

Although Dutton's doctorate is not in psychology but in "justice studies," her proffered testimony clearly falls within the ambit of psychology. While her description of her experience mentions her experience as a forensic interviewer for twenty years, she primarily builds up her expertise based upon the continuing education she has received and the literature and research she has reviewed. But Dutton's testimony focuses not on her own personal experience as an interviewer or researcher but rather upon research conducted by others. Since the State is clearly hoping that the jury will see this evidence as science, the State should be required to show that Dutton's testimony withstands scientific scrutiny.

CSAAS testimony is not so indistinguishable from the repressed memory testimony offered in *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000). Writing for a slim majority, Justice Feldman decided that testimony on human behavior may be admitted under Rule 702 without even conducting a *Frye* hearing, not unlike his previous opinions in *Lindsey* and *Moran*. *Id*. ¶¶ 30-31, 1 P.3d at 123. The *Logerquist* opinion was roundly criticized by Justice Martone in dissent, noting that "[a]fter today's decision, any 'expert' can walk into an Arizona courtroom and testify about human behavior without any threshold showing of scientific reliability." *Id*. ¶¶ 80-81, 1 P.3d at 137. Noting that the developing research and literature on memory had begun

calling Freudian theory into question, Justice Martone pointed out that this "testable hypothesis [that] has not yet been appropriately tested" must be subjected to a "heightened form of evidentiary scrutiny." *Id*. ¶¶ 87-88, 1 P.3d at 138-39 (quoting 1 David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, *Modern Scientific Evidence: the Law and Science of Expert Testimony* § 13-2.0, at 115-50 (1997)). Like CSAAS, "'the theory of repressed memories has its roots in clinical therapy, a domain in which validity is not a factor of overriding concern.'" *Id*. ¶ 86 (quoting *Modern Scientific Evidence* § 13-1.5, at 534-35).

As shown above, CSAAS was borne out of the mind of a clinical psychiatrist hoping to help his peers treat their patients, and it was immediately thereafter carried by the likes of Dutton into the courtroom as if demonstrated as scientific fact. This Court assumed in *Lindsey* that this kind of evidence was validated, but nothing in that case showed that had been the case. And in *Moran*, this Court disallowed expert witnesses from opining that they believed the accuser was telling the truth, but determined consistent with *Lindsey* that the general testimony that was provided would be entirely appropriate. For example, *Moran* involved recantation of accusations and the witnesses offered research (but no personal experience) that recantation of accusations is very common. *Id*. at 383-84, 728 P.2d at 253-54. Yet this is exactly one of the CSAAS symptoms that the London critique of CSAAS demonstrated as having no scientific validity at all.

Psychology and psychiatry are well-respected scientific fields; witnesses who profess sufficient expertise in these fields are expected to be able to demonstrate not only their own knowledge of the subject but also point to research that supports their claims. As Justice Martone stated in *Logerquist* about such testimony in this field, "observation-based experience and inductive reasoning … lie at the heart of the scientific method." 196 Ariz. 470, ¶ 80, 1 P.3d at

137. *Lindsey* and *Moran* assumed that the psychologists and psychiatrists were offering tested information (in part because the parties had not challenged the scientific underpinnings of the generalized expert opinions offered in those cases), but it is now time to challenge these assumptions. The Supreme Court has extended that invitation to trial courts in *Salazar-Mercado*.

CONCLUSION

Child sex cases are difficult to bring for prosecutors. But as noted in *Moran*, 151 Ariz. at 380 n.2, 728 P.2d at 250 n.2, relaxation of evidentiary rules for the benefit of prosecutors carries with it the peril that the right to a fair trial for the accused will be sacrificed in the name of children. This case is not unusual in that it is essentially a swearing contest between accusers and accused. Bringing in an "expert on child sexual abuse" irretrievably insinuates into the proceedings the idea that the accuser was in fact abused. Further weighing against admission is the problem that over-admission of expert evidence tends to provide weight on the side that calls the witness, despite best efforts of jury instructions to remind jurors that they determine how much weight or credibility to give to an expert witness's testimony. *See* Gitlin, at 540 (citing *People v. Bowker*, 249 Cal. Rptr. 886, 891 (Cal. App. 1988) (jurors may misinterpret "not inconsistent with abuse" as statement that "this child was abused")).

Wendy Dutton's testimony in this case (and in virtually all other cases) on delayed disclosure is, at most, marginally relevant. *Moran*, 151 Ariz. at 282, 728 P.2d at 382 (citing *State v. Petrich*, 683 P.2d 173, 179-80 (Wash. 1984)). Dutton's testimony does not meet the requirements of Rule 702. For these reasons, this Court should follow the other jurisdictions that have found CSAAS evidence to be unreliable and find that Dutton's CSAAS testimony clearly does not meet the standard for admissibility under Rule 702.